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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. RYAN JOSEPH MAXSTADT, Defendant and Appellant.	A153888 (Mendocino County Super. Ct. No. SCUK-CRCR-2016-88551-1)

Defendant Ryan Maxstadt led law enforcement officers on a high-speed chase and shot toward one of them as the pursuit was ending. After he pleaded guilty to two felonies, two trials were held on the remaining charges. In the first trial, a jury convicted him of two more felonies but was unable to reach a verdict on a charge of attempted murder of a peace officer. In the second trial, the attempted-murder count was retried, and a jury convicted him of it. The trial court then sentenced him to 38 years and eight months to life in prison.

On appeal, Maxstadt contends that the attempted-murder conviction must be reversed because it lacks substantial evidence and the trial court erred by instructing the jury on the crime's elements. He also claims that errors in the determinate and indeterminate abstracts of judgment require correction. We agree that the abstracts must be corrected in one respect, but we otherwise affirm.

I.
FACTUAL AND PROCEDURAL BACKGROUND

A. Facts.

Because only the attempted-murder conviction is at issue in this appeal, we summarize the evidence presented in the second trial. In December 2016, the Ukiah police noticed an uptick in burglaries, and they suspected that a black Kia Sportage was involved. On December 17, the police saw the Kia and pursued it in a chase, but ultimately ended the chase "for safety reasons" without apprehending anyone. Property thrown from the vehicle during the chase was later determined to be stolen.

Three days later, a Ukiah police officer was on patrol when he spotted the same Kia parked at a convenience store. He pulled into the parking lot and attempted to block in the vehicle, but the driver, later identified as Maxstadt, "pull[ed] out abruptly" and drove away. The officer activated his vehicle's siren and emergency lights, but the Kia did not stop and instead got onto Highway 101 heading north. Anticipating another chase, the officer requested assistance from the California Highway Patrol (CHP).

At speeds varying between 80 and 120 miles per hour, the Ukiah police officer continued to pursue the Kia and was eventually joined by two other police officers. As all the vehicles approached Highway 20, the Kia moved into the right lane as if to exit. It sped up and continued northbound, however, and shortly afterward a CHP unit took over as the lead vehicle in the chase.

After the Kia exited the highway toward south Willits, it drove over a spike strip that had been deployed on the road and slowed down significantly. The CHP officer driving the lead vehicle testified that as the pursuit continued into Willits, Maxstadt began throwing things out of the Kia. The CHP officer then "saw the hand come out of the window again," pointing what appeared to be a black revolver back toward him. Fearing for his life, the CHP officer "swerved [his] patrol vehicle to the right out of the line of fire." He then heard two gunshots.

None of the other pursuing officers heard gunshots or saw a gun or muzzle flashes, but a video recording from the CHP officer's vehicle was played for the jury. According to the CHP officer, the video appeared to show two muzzle flashes and record two gunshot "popping sound[s]" at the same time. A forensic analyst who testified as an expert witness for the prosecution opined that the recording contained the sound of a gunshot. The expert testified that at "the exact same time as the acoustical event of a gunshot on the audio, there was a muzzle flash coming from the driver's window area of the vehicle." An expert witness for the defense, however, opined that the flashes on the recording were reflections of outside lights, not muzzle flashes.

Eventually, the Kia pulled into a residential driveway in Willits, and Maxstadt exited the vehicle and began running. About 10 minutes later, after a police canine search, he was discovered hiding in a nearby creek and was taken into custody. No firearm or other ballistics evidence was ever recovered, although an unzipped gun case that could hold a mid-sized revolver was discovered in the Kia's cargo area. Evidence was presented that revolvers do not eject shell casings when they are shot, and a Mendocino County Sheriff's deputy involved in the chase testified that finding a gun in the heavily wooded area where Maxstadt hid would have been like finding a "[n]eedle in the haystack."

B. Procedural History.

In June 2017, Maxstadt was charged with five felonies: attempted murder of a peace officer as to the CHP officer, assault with a firearm on a peace officer as to the same officer, possession of a firearm by a felon, reckless driving while evading a peace officer, and unlawful use of a motor vehicle.[1] Maxstadt pleaded guilty to the latter two counts. In August 2017, a jury convicted him of the counts of assault with a firearm and

[1] The charges were brought under Penal Code sections 187, subdivision (a) and 664, subdivision (e) (attempted murder), 245, subdivision (d)(1) (assault with firearm), and 29800, subdivision (a)(1) (possession of firearm by felon), and Vehicle Code sections 2800.2, subdivision (a) (reckless driving) and 10851, subdivision (a) (unlawful use of vehicle). All further statutory references are to the Penal Code.

possession of a firearm by a felon and found true that he personally used a firearm during the assault.[2] It was unable to reach a verdict on attempted murder, however, and the trial court declared a mistrial as to that count. The court also found true that Maxstadt had suffered two prior prison terms.[3]

In January 2018, Maxstadt was retried, and a different jury convicted him of the attempted-murder count. The jury also found true that the attempt was willful, deliberate, and premeditated and that Maxstadt personally and intentionally discharged a firearm during the offense.[4] That March, the trial court sentenced him to a total term of 38 years and eight months to life in prison, composed of a term of three years for the reckless driving, consecutive terms of eight months for the unlawful use of a vehicle, 20 years for the personal and intentional discharge of a firearm, and 15 years to life for the attempted murder, and a concurrent term of two years for possession of a firearm by a felon. A term of 10 years for the use of a firearm and a term of six years for the assault with a firearm were imposed and stayed.

II.
DISCUSSION

A. Substantial Evidence Supports the Attempted-murder Conviction.

Maxstadt claims that the conviction for attempted murder must be reversed because there was insufficient evidence that he acted with a specific intent to kill. We disagree.

To evaluate Maxstadt's claim, " 'we review the whole record to determine whether . . . [there is] substantial evidence to support the verdict . . . such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.

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[2] The personal-use allegation was found true under section 12022.5, subdivision (a).

[3] The prior-prison-term allegations were found true under section 667.5, subdivision (b).

[4] The allegation that the attempted murder was willful, deliberate, and premeditated was found true under section 664, subdivision (f), and the personal-discharge allegation was found true under section 12022.53, subdivision (c).

[Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] "Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the . . . jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." ' " (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.)

To sustain a conviction of attempted murder, there must be sufficient evidence of " 'the specific intent to kill,' " the only element at issue here, as well as " 'the commission of a direct but ineffectual act toward accomplishing the killing.' " (*People v. Houston* (2012) 54 Cal.4th 1186, 1217 (*Houston*).) Attempted murder, unlike murder, requires a showing of express malice, a mind state that requires a defendant to have "a deliberate intention unlawfully to kill a fellow human being." (*People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690.) As "[t]here is rarely direct evidence of a defendant's intent[,] . . . [s]uch intent must usually be derived from all the circumstances of the attempt, including the defendant's actions." (*Ibid.*)

We conclude that there was substantial evidence Maxstadt acted with express malice, based on the general principle that "[t]he act of shooting a firearm toward a victim at close range in a manner that could have inflicted a mortal wound had the shot been on target is sufficient to support an inference of an intent to kill." (*Houston, supra*, 54 Cal.4th at p. 1218.) Here, as the CHP officer followed the Kia, which was no longer able to travel at high speeds, he was close enough to see Maxstadt point a revolver out of the window at him. In addition, both the CHP officer's and the prosecution expert's testimony constituted substantial evidence that Maxstadt fired a gun.

Although Maxstadt concedes the evidence "reasonably established [he] fired his gun . . . in an attempt to have the pursuing officers back off," he argues that it "simply did not establish [that he] possessed a specific intent to kill [the CHP officer]." To the extent Maxstadt means to suggest that proof of his intent to kill that officer in particular was required, he is incorrect. " 'The mental state required for attempted murder is the intent

to kill *a* human being, not a *particular* human being.' " (*People v. Perez* (2010) 50 Cal.4th 222, 225.) Thus, "an indiscriminate would-be killer who fires into a crowd is just as culpable as one who targets a specific victim." (*Houston, supra*, 54 Cal.4th at p. 1218.) It is undisputed that Maxstadt knew there were officers behind him, and any further indication that he knew which officer in particular he was shooting at was not required.

Maxstadt also cites *People v. Perez, supra*, 50 Cal.4th 222, for its statement that " 'shooting at a person or persons and thereby endangering their lives does not itself establish the requisite intent for the crime of attempted murder.' " (Quoting *id.* at p. 224.) In *Perez*, however, the issue was whether the defendant's firing of a single bullet at a group of eight people could support eight convictions for attempted murder, and it was taken for granted that the evidence supported at least one such conviction. (*Ibid.*) Thus, in the quoted statement the Supreme Court was explaining that shooting one bullet toward a large group of people does not establish the requisite intent as to *all* the people in the group, not suggesting that shooting toward a person and endangering his or her life fails to support the inference of an intent to kill. Here, Maxstadt was charged and convicted of only one count of attempted murder based on his shooting toward the CHP officer, and there was sufficient evidence that Maxstadt intended to kill one person.

B. The Trial Court Did Not Err by Giving CALCRIM No. 600.

Maxstadt also claims that CALCRIM No. 600, the standard instruction on attempted murder given in this case, is erroneous because "it effectively instructs the jury that a direct step [toward accomplishing a killing] equals an intent to kill." He is incorrect.

The jury was instructed under CALCRIM No. 600 as follows, and the language Maxstadt challenges is italicized:

> The defendant is charged in Count One with attempted murder.
>
> To prove that the defendant is guilty of attempted murder, the People must prove that:

1. The defendant took at least one direct but ineffective step toward killing another person;

AND

2. The defendant intended to kill that person.

A direct step requires more than merely planning or preparing to commit murder or obtaining or arranging for something needed to commit murder. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. *A direct step indicates a definite and unambiguous intent to kill.* It is a direct movement toward the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt.

A person who attempts to commit murder is guilty of attempted murder even if, after taking a direct step toward killing, he abandons further efforts to complete the crime, or his attempt fails or is interrupted by someone or something beyond his control. On the other hand, if a person freely and voluntarily abandons his plans before taking a direct step toward committing the murder, then that person is not guilty of attempted murder.

We review de novo whether a jury instruction accurately states the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) "Review of the adequacy of the instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.' [Citation.] ' "In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given." [Citation.]' [Citation.] 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' " (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

The same claim of instructional error that Maxstadt champions here was rejected in *People v. Lawrence* (2009) 177 Cal.App.4th 547 (*Lawrence*). In that case, the defendant contended that the same sentence of CALCRIM No. 600 with which Maxstadt takes issue "erroneously and prejudicially conflated the mental state and act requirements

of the crime, and suggested to jurors that once they found [the defendant] took a direct step toward the killing of another [by firing a shotgun] . . . they had also found the requisite intent to kill." (*Lawrence*, at p. 556.) The Court of Appeal disagreed, concluding that "CALCRIM No. 600 correctly states the law." (*Id.* at p. 557; accord *People v. Ramos* (2011) 193 Cal.App.4th 43, 47.)

Maxstadt urges us not to follow *Lawrence*, contending it "was incorrectly decided." He attacks the decision's determination that there was "no substantive difference" between the challenged language in CALCRIM No. 600 and language in "CALJIC former No. 6.00, which instructed in pertinent part that acts are sufficient when they ' "clearly indicate a certain, unambiguous intent to commit that specific crime, and, in themselves, are an immediate step in the present execution of the criminal design," ' " that the Supreme Court had held correctly stated the law. (*Lawrence*, *supra*, 177 Cal.App.4th at p. 557, quoting *People v. Dillon* (1983) 34 Cal.3d 441, 452-453.) Maxstadt claims that *Lawrence*'s "analogy is inapt" because the instructional language approved in *Dillon* did not "equate the actus [reus] and mens rea elements for attempted murder."

Although we agree with Maxstadt that the challenged language in CALCRIM No. 600 is more susceptible to the interpretation he urges than was the language in CALJIC former No. 6.00, we agree with *Lawrence* that when the challenged language is "considered in context, . . . there is no reasonable likelihood jurors understood it" as collapsing the two elements of attempted murder. (*Lawrence*, *supra*, 177 Cal.App.4th at p. 557.) As the Court of Appeal explained, "The instruction as a whole makes it clear that in order to find an attempt, the jury must find two distinct elements: an act and an intent. These elements are related; usually, whether a defendant harbored the required intent to kill must be inferred from the circumstances of the act. [Citation.] Read in context, it is readily apparent the challenged language refers to the act that must be found, and is part of an explanation of how jurors are to determine whether the accused's conduct constituted the requisite direct step or merely insufficient planning or

preparation." (*Ibid.*) We conclude that the trial court did not err by instructing the jury under CALCRIM No. 600.

C. A Clerical Error Appears in Both Abstracts of Judgment.

Finally, Maxstadt claims that errors in the determinate and indeterminate abstracts of judgment require correction. We agree with him in part.

Maxstadt's first claim is in connection with his conviction for assault with a firearm on a peace officer. When sentencing him on that conviction, the trial court stated, "I will select . . . the midterm of six years. Impose it concurrent, but I am going to stay it pursuant to [section] 654." In accordance with the court's oral pronouncement, the determinate abstract of judgment reflects that Maxstadt was sentenced to a concurrent term on this count that was stayed under section 654.

Relying on *People v. Alford* (2010) 180 Cal.App.4th 1463, Maxstadt claims that the "[i]mposition of a concurrent sentence is inconsistent with a finding [that] . . . section 654 applies." *Alford* held that "to implement section 654, the trial court must impose sentence on all counts, but stay execution of sentence as necessary to prevent multiple punishment." (*Id.* at p. 1469.) In the course of reaching this conclusion, *Alford* stated that "[i]mposition of concurrent sentences is not the correct method of implementing section 654, because a concurrent sentence is still punishment." (*Id.* at p. 1468.) But the Court of Appeal was merely stating that section 654 is not satisfied by imposing a concurrent, rather than a consecutive, term. It was not suggesting that the statute prohibits a trial court from imposing a concurrent term and then staying its execution. Maxstadt cites no authority for the proposition that a sentence stayed under section 654 cannot be designated as a concurrent term.

Maxstadt also argues, and the Attorney General concedes, that both abstracts of judgment must be corrected to remove a checkmark in the box indicating that sentencing occurred "per PC 667(b)-(i) or PC 1170.12," that is, under the Three Strikes law. As Maxstadt points out, no prior conviction for a serious or violent felony was pled or proven, and he was not sentenced under the Three Strikes law. We therefore agree that the abstracts must be modified to remove the checkmarks in question.

III.
DISPOSITION

The judgment is affirmed. The trial court is directed to correct both the determinate and indeterminate abstracts of judgment to remove the checkmark in the box indicating that Maxstadt was sentenced under the Three Strikes law and to ensure that certified copies of both corrected abstracts are sent to the Department of Corrections and Rehabilitation.

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Humes, P.J.

WE CONCUR:

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Margulies, J.

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Banke, J.

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